Supreme Court, U.S.
FILED
DEC 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-702

In The

Supreme Court of the United States

October Term, 1989

CHAMPION MORTGAGE COMPANY, A California Corporation,

Petitioner,

v.

LAKE TRAVIS ISLAND, LTD.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

LAW OFFICES OF PETER D. LEPISCOPO
KEVIN J. MCINERNEY*
PETER D. LEPISCOPO
Suite 300
9665 Chesapeake Drive
San Diego, California 92123
Telephone: (619) 560-1700

Counsel for Petitioner

*Counsel of Record

On The Brief:
HOWARD H. ORENSTEIN

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TOPICAL INDEX

TOPICAL INDEX i

TABLE OF AUTHORITIES ii

REPLY TO BRIEF IN OPPOSITION 1

1. PETITIONER HAS PRESERVED THE ERROR COMPLAINED OF IN ITS PETITION IN ALL FEDERAL COURTS BELOW: COULD THE STATE OF TEXAS CONSTITUTIONALLY EXERCISE *IN PERSONAM* JURISDICTION OVER PETITIONER 1

2. THERE IS A CONFLICT BETWEEN THE CIRCUITS ON THE QUESTION PRESENTED BY PETITIONER 3

3. THE PROCEDURE AND BURDEN OF PROOF APPLIED BY THE FIFTH CIRCUIT COURT OF APPEALS DOES NOT COMPORT WITH CONSTITUTIONAL DUE PROCESS REQUIREMENTS 6

4. PETITIONER DID NOT WAIVE ITS RIGHTS FOR REVIEW BY THIS COURT BY FAILING TO REQUEST ORAL ARGUMENT OR AN EVIDENTIARY HEARING 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Boynton v. Virginia, 364 U.S. 454 (1960) 1

California v. Taylor, 353 U.S. 553 (1957) 1

D.J. Investments v. Metzeler Motorcycle Tire, 754 F.2d 542 (5th Cir.1985) 5

Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280 (9th Cir.1977) 4, 7

Duignan v. United States, 274 U.S. 195 (1927) 1

International Shoe Company v. State of Washington, 326 U.S. 310 (1945) 6

Jetco Electronic Industries, Inc. v. Gardiner, 473 F.2d 1228 (5th Cir.1973) 5

Marine Midland Bank, N.A. v. Miller, 664 F.2d 899 (2nd Cir.1981) 4, 7

Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir.1974) 4

Union Carbide Corp. v. UGI Corp., 731 F.2d 1186 (5th Cir.1984) 4

Welsh v. Gibbs, 631 F.2d 436 (6th Cir.1980) 4

Youakim v. Miller, 425 U.S. 231 (1976) 1, 2

RULES

Rule 12(b)(2), Federal Rules of Civil Procedure **3, 6**

Rule 43(e), Federal Rules of Civil Procedure **3, 7**

Rule 300-5(h), Western District of Texas Local Rules **3**

REPLY TO BRIEF IN OPPOSITION

1. PETITIONER HAS PRESERVED THE ERROR COMPLAINED OF IN ITS PETITION IN ALL FEDERAL COURTS BELOW: COULD THE STATE OF TEXAS CONSTITUTIONALLY EXERCISE *IN PERSONAM* JURISDICTION OVER PETITIONER

Ordinarily, this Court does not decide questions not raised or resolved in the lower federal courts, *California v. Taylor*, 353 U.S. 553, 557 n. 2 (1957); and it is only in exceptional cases coming to this Court from federal courts below that questions *not pressed* or *passed upon* below are reviewed. *Duignan v. United States*, 274 U.S. 195, 200 (1927) (emphasis added). However, this rule is not inflexible. *Boynton v. Virginia*, 364 U.S. 454, 457 (1960).

In its Brief In Opposition, Respondent relies on *Youakim v. Miller*, 425 U.S. 231 (1976) ("*Youakim*") to support Respondent's proposition that Petitioner has not preserved the error complained of in the petition. (Brief In Opposition at 8). However, a correct reading of *Youakim* proves to the contrary.

In *Youakim*, the appellants filed a complaint in the United States District Court for the Northern District of Illinois, praying for injunctive relief. In their complaint, appellants relied solely upon the Equal Protection Clause for their constitutional challenge to an Illinois statute. However, in appellants' jurisdictional statement to this Court on appeal, appellants challenged the Illinois statute on the Equal Protection Clause and, for the first time, on the Supremacy Clause. Although the *Youakim* Court found that appellants did not raise the Supremacy Clause

challenge in the district court, the Court permitted the appellants to raise the issue for the first time in this Court. *Id.* at 235. In addition, the Court noted that had the Supremacy Clause challenge been made in the district court, that challenge, ultimately, would have been rejected. *Id.*

The question presented to this Court in the petition is the same question which was presented to both the District Court and Court of Appeals: Can the State of Texas Constitutionally exercise *in personam* jurisdiction over Petitioner? More specifically, the question presented to this Court is the Fifth Circuit's approach to resolving the *in personam* jurisdiction question, which Petitioner contends resulted in the District Court and Court of Appeals incorrectly concluding that the State of Texas had *in personam* jurisdiction over Petitioner.

In *Youakim*, this Court permitted the appellants to raise a *separate* constitutional challenge for the first time in this Court, whereas in the case at bar Petitioner has *always* maintained in the federal courts below that the State of Texas did not have *in personam* jurisdiction over Petitioner. In framing the issue for this Court to review, Petitioner has focused on the means utilized by the courts below which Petitioner contends resulted in the unconstitutional exercise of *in personam* jurisdiction over Petitioner. Therefore, Respondent's contention that Petitioner is raising the issue in its petition for the first time in this Court is without merit. Respondent requests that this Court sacrifice substance for form; however, *Youakim* precludes that approach to avoid this Court's review. *Id.*

In addition, Respondent contends that because Petitioner did not request oral argument or an evidentiary hearing in the District Court, Petitioner has not preserved the error complained of in the petition. (Brief in Opposition at 9-10). However, for the reasons stated above and as will be demonstrated below in Paragraph 4, this contention is without merit because the District Court's Local Rule 300-5(h) ("Local Rule") is in direct conflict with Rule 43(e) of the Federal Rules of Civil Procedure ("FRCP").

2. THERE IS A CONFLICT BETWEEN THE CIRCUITS ON THE QUESTION PRESENTED BY PETITIONER

In analyzing the conflict between the Circuits, with regard to ruling on a Rule 12(b)(2), FRCP, motion to dismiss for lack of *in personam* jurisdiction, the relevant point which must be made is that the Second, Sixth and Ninth Circuits apply different burdens of proof and procedures when there exists factual disputes and/or issues of credibility. Those Circuits recognize the reality that if a *prima facie* standard of proof is applied without regard to factual disputes and/or issues of credibility, *in personam* jurisdiction will always be established.

For example, in the Ninth and Sixth Circuits the approach to a Rule 12(b)(2), FRCP, motion to dismiss is:

> If the pleadings and other submitted materials raise *issues of credibility or disputed questions of fact* with regard to jurisdiction, the district court *has* the discretion to take evidence at a *preliminary hearing* in order to resolve the contested issues. [citations omitted] In this situation, where plaintiff is put to his full proof, plaintiff

> *must establish the jurisdictional facts by a preponderance of the evidence,* just as he would have to do at trial.

Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1285 (9th Cir.1977); *Welsh v. Gibbs*, 631 F.2d 436, 438-39 (6th Cir.1980) (emphasis added).

Similarly, the Second Circuit employs the following approach:

> In deciding a pretrial motion to dismiss for lack of personal jurisdiction a district court has considerable leeway. It may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion. [citations omitted] If the *court chooses* not to conduct a full-blown evidentiary hearing on the motion, the plaintiff need only make a *prima facie* showing . . . Eventually, of course, the plaintiff must establish jurisdiction by a preponderance of the evidence either at a *pretrial hearing* or at trial.

Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2nd Cir.1981) (emphasis added).

In contrast to the Second, Sixth and Ninth Circuits, the Fifth Circuit applies a *prima facie* burden of proof, regardless of the extent of factual disputes and/or issues of credibility, and regardless of whether or not there is a hearing on the motion. *Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1189 & n. 4, 1190 (5th Cir.1984) (hearing held and *prima facie* burden of proof applied to find *in personam* jurisdiction); *Products Promotions, Inc. v. Cousteau*, 495 F.2d 483, 489 & n. 5, 490 & n. 7, 491 & nn. 8 & 9 (5th Cir.1974) (hearing held and the court applied a *prima*

facie burden of proof); *Jetco Electronic Industries v. Gardiner*, 473 F.2d 1228, 1232 & n. 4 (5th Cir.1973) (this case indicates that a *prima facie* burden of proof is the proper standard to be applied, even if there is a hearing on the motion, but at trial a preponderance of the evidence burden of proof must be applied); *D.J. Investments v. Metzeler Motorcycle Tire*, 754 F.2d 542, 545-46 (5th Cir.1985).

The above cases demonstrate that the Second, Sixth and Ninth Circuits recognize that there is no bright line approach for deciding whether or not there is *in personam* jurisdiction over a non-resident defendant. This observation is further supported by the approach adopted by the Second Circuit, wherein the district courts may go so far as to order that additional discovery be conducted to aid the court's determination. This approach evinces the Second Circuit's concern with the truth finding process, inasmuch as it relates to ascertaining whether or not there are *credible* facts which support the exercise of *in personam* jurisdiction. Furthermore, when there exists factual disputes and/or issues of credibility, the Second, Sixth and Ninth Circuits may order an evidentiary hearing wherein the court must resolve any disputed matters by a *preponderance* of the evidence. This clearly evinces those Circuits' unwillingness to blindly adhere to a rigid rule, such as the one applied by the Fifth Circuit, which inevitably results in the exercise of *in personam* jurisdiction over the non-resident defendant.

It is evident from the foregoing cases that the Second, Sixth and Ninth Circuits apply different burdens of proof and employ different procedures than those of the Fifth Circuit; therefore, Respondent's contention that there is no conflict between the Circuits is without merit.

3. THE PROCEDURE AND BURDEN OF PROOF APPLIED BY THE FIFTH CIRCUIT COURT OF APPEALS DOES NOT COMPORT WITH CONSTITUTIONAL DUE PROCESS REQUIREMENTS

It is evident from the foregoing cases, that when ruling on a Rule 12(b)(2), FRCP, motion to dismiss for lack of *in personam* jurisdiction, the Fifth Circuit applies a *prima facie* burden of proof regardless of the existence of factual disputes and/or issues of credibility, and regardless of whether or not there is a hearing on the motion. The one and only time that the Fifth Circuit requires that a burden of proof greater than *prima facie* should be applied is when the case is a trial, at which time a preponderance of the evidence is the burden of proof which is applied.

To adopt the Fifth Circuit's approach to ruling on a Rule 12(b)(2), FRCP, motion to dismiss would result in an insurmountable burden for the non-resident defendant to overcome. When substantial factual disputes and/or issues of credibility exist, an evidentiary hearing should be held and, as the Second, Sixth and Ninth Circuits already require, the burden of proof applied must be a preponderance of the evidence. To do otherwise would offend traditional notions of fairplay and substantial justice. *International Shoe Company v. State of Washington*, 326 U.S. 310 (1945).

4. PETITIONER DID NOT WAIVE ITS RIGHTS FOR REVIEW BY THIS COURT BY FAILING TO REQUEST ORAL ARGUMENT OR AN EVIDENTIARY HEARING

In its Brief In Opposition, Respondent contends that Petitioner's failure to request oral argument or an

evidentiary hearing resulted in Petitioner's waiver of its rights for review by this Court. (Brief In Opposition at 8-10).

When Rule 43(e), FRCP, and the Local Rule are juxtaposed, it becomes evident that the Local Rule places the responsibility on the moving party to request an evidentiary hearing, whereas Rule 43(e), FRCP, places the responsibility with the court. The practical effect, as Respondent points out, is a waiver when the moving party fails to request a hearing. The Second, Sixth and Ninth Circuits do not employ such a rule. Moreover, the decision as to whether or not to conduct an evidentiary hearing is a decision which must be made by the *court* not the moving party (see *Data Disc, Inc., supra,* 557 F.2d at 1285; *Welsh, supra,* 631 F.2d at 438-39; *Marine Midland Bank, N.A., supra,* 664 F.2d at 904). To do otherwise would defeat the purpose of Rule 43(e), FRCP, which clearly places the discretion in the court to order a hearing on the motion. Finally, even if a hearing would have been requested by Petitioner the result would have been the same: the District Circuit would have applied a *prima facie* standard and *in personam* jurisdiction would have been exercised over Petitioner.

It is clear from the foregoing cases and Rule 43(e), FRCP, that the *court* not the moving party is placed with the responsibility of deciding whether or not to conduct an evidentiary hearing. Therefore, to the extent that the Local Rule of the District Court below places that responsibility on the moving party it should be held to be invalid.

Based on the foregoing, Respondent's contention that Petitioner waived its rights for review by this Court is without merit.

CONCLUSION

For the foregoing reasons, Champion Mortgage Company respectfully requests that this Court grant its Petition for Writ of Certiorari.

LAW OFFICES OF PETER D. LEPISCOPO
KEVIN J. MCINERNEY
PETER D. LEPISCOPO
Counsel for Petitioner

On The Brief:
HOWARD H. ORENSTEIN

DATED: December 28, 1989